TAN LIAN HENG

v.

KILANG PAPAN AMAN SDN. BHD. & ANOR.

HIGH COURT MALAYA, KUANTAN
SHAIK DAUD ISMAIL J
[CIVIL SUIT NO. 179 OF 1980]
31 DECEMBER 1983

TORT: *Negligence - Industrial accident - Occurred during and in the course of employment - Wheel of forklift ran over plaintiff - Foot crushed as a result.*

The plaintiff was run over by the tyre of a forklift belonging to the first defendant and negligently driven by the second defendant. This accident occurred during and in the course of employment. The plaintiff's right foot was crushed and deformed.

Held:

[1] The second defendant practically admitted to being negligent. The defendants were liable.

[2] The plaintiff was awarded special damages of RM370 for travelling expenses and for a medical report; a sum of RM28,000 for loss of earnings from the date of the accident until the last date of treatment; a sum of RM30,000 for pain and suffering; a sum of RM16,300 for loss of earning capacity; a sum of RM33,900 for future loss of earnings; interest of 3% p.a. on the special damages from the date of accident to the date of service and thereafter at 6% p.a. and interest of 6% p.a. from date of service to the date of judgment on the rest of the award except for future loss of earnings and thereafter at 8% p.a.

Cases referred to:

Murtadza b. Mohd. Hassan v. Chong Swee Pian [1980] 1 MLJ 216
Jefford v. Gee [1970] 1 All ER 1201

For the plaintiff - Mahindar Singh; M/s. Mahindar & Co
For the defendants - Loy Tuan Bee; M/s. Mah-Kok & Din

JUDGMENTS

Shaik Daud Ismail J:

This is a claim by the plaintiff against his employers arising out of an accident at the work-site. The statement of claim states that plaintiff was employed by the first defendant, a private limited company and that the second defendant was employed by the first defendant at a sawmill at Batu 7½ Jalan Gambang, Kuantan. On or about 22 October 1975 the plaintiff was run over by the tyre of a forklift belonging to the first defendant and negligently driven by the second defendant. This accident occurred during and in the course of the employment where plaintiff suffered personal injuries and loss. Plaintiff in his Statement of Claim contends that as a result of the accident his right foot was crushed and deformed. He now claims loss of wages for 40 months, expenses and general damages. Both the defendants have denied liability and the alleged negligence.

The plaintiff in his evidence states that he is 25 years old and that on 22 October 1975 he was working as a forklift attendant. The forklift No. CE 6401 was driven by second defendant. Plaintiff then describes his work as an attendant. He says that he has to follow the forklift wherever it went. At the sawmill where plaintiff works huge pieces of logs were cut cut into small pieces and planks and the forklift is used to convey the cut pieces to be stacked

outside the mill. Plaintiff states that in order for the forklift to lift the sawn timber from the ground there has to be a space between the sawn timber and the ground. This space is created by placing two pieces of wedge called "long" under the sawn timber. As an attendant it is the plaintiff's duty to follow the forklift to the place where the sawn timber is to be stacked, then plaintiff would place the 2 "longs" or wedges on the ground after which the driver of the forklift would lower the load of sawn timber onto the two wedges.

Plaintiff states that on the day in question the forklift driven by second defendant had taken sawn timber from inside the mill, to be stacked outside the mill, near the fence forming the boundary of the mill compound. Along this fence is a gravel road used by timber lorries to bring timber to the mill. Plaintiff states that on the day in question the gravel road was uneven as there were depressions caused by tyre marks of the timber lorries. As usual plaintiff says he followed the forklift which was loaded with sawn timber to the side of the fence. As usual, plaintiff went to get the two wedges which were by the fence. Plaintiff took one of the wedges and placed it on the ground and wanted to go for the second wedge. He went to the side of the fence, took the second wedge and as he was bringing it to the spot and when he was about one foot from the forklift on its right side suddenly the forklift swung around and plaintiff was hit by the forklift's left wheel and he fell down after which the wheel ran over his right foot. Plaintiff says that on seeing the forklift swung he threw the wedge and wanted to retreat but it was too late. Plaintiff states that at the time of the accident he was paid RM6 per day per shift and that he used to work 1½ shift and was paid extra RM3. On the average he would earn about RM250 to RM270 per month. After the accident he could not work either as an attendant or as a labourer and he also approached the defendant but they could not offer him any position. In view of his present condition as a result of the accident he could not get a job as a forklift attendant and was in and out of the hospital several times.

The plaintiff called Dr. A.F.M. Jacques, the Consultant Surgeon attached to Kelinik Pembedahan Fatimah, Kuantan, who examined the plaintiff on 5 November 1980 and tenders his findings as P2. Dr. Jacques states that the condition of the plaintiff's foot was definitely as a result of loss of tissue and not because of treatment. He says that the loss of tissue was a result of the accident.

The plaintiff also calls an eye witness to the accident. He is Ong Sum Koy, who was the plaintiff's and the second defendant's "kepala" at the mill. This witness testifies that on the day in question he was about 28 feet away from the said forklift. According to Ong, plaintiff had already placed one wedge on the ground and at that time the forklift was stationary with its engine running and the sawn timber was held hight on the forklift. At this time he saw plaintiff bring the second wedge and at that time someone shouted at the driver of the forklift not to stack the sawn timber at that particular place. On hearing this, the driver suddenly reversed the fork-lift. At that time plaintiff was approaching the forklift with the second wedge. According to Ong, the driver, the second defendant, did not even look at his rear before reversing. The left tyre of the forklift hit the plaintiff and Ong shouted to the second defendant to stop.

The second defendant gave evidence that on the day in question he was the forklift driver and plaintiff his attendant. The rest of his evidence is in fact a confirmation of the evidence of plaintiff and Ong. Second defendant says that after plaintiff had placed the first wedge he heard someone shouting to him not to place the load at that particular spot. On hearing this he suddenly reversed and at that time he did not know exactly where plaintiff was. Immediately after he reversed he heard a second shout when he stopped the forklift and discovered that

plaintiff had been hit. In cross-examination second defendant agreed that he reversed suddenly on hearing the first shout and also agreed that when he suddenly reversed he did not think about the plaintiff. He also agreed that when he reversed he forgot about the safety of the plaintiff.

In his submission, learned Counsel for the defence contends that since plaintiff can also give instructions to the driver and *vice versa*, he, the plaintiff, should take care of himself and cannot completely depend on the driver. In that respect plaintiff has to an extent contributed to the accident.

On the evidence available before the Court especially the evidence of second defendant who practically admitted to being negligent when he admitted that he suddenly reversed and did not at all consider the safety of the plaintiff, the question of who is liable for this accident is as clear as daylight. In the circumstances of this case and when one pauses to consider the duty of plaintiff as an attendant, there is no other alternative to arrive at other than that the plaintiff can in no way be blamed for this accident irrespective of who could give instructions to whom. The plaintiff has not in any way shown one iota of negligence on his part. He was doing his normal duty of placing the wedges and in the normal circumstances as the forklift was stationary, there was no danger whatsoever to the plaintiff. It would have been an entirely different situation had he, the plaintiff, been moving about within the vicinity of the forklift when it was then in motion. In that situation the plaintiff would certainly have to look out for himself and ensure his own safety while doing his work. In the present case there was no reason whatsoever for plaintiff to look out for himself when it was the duty of the second defendant to remain stationary. Although it may have been right for second defendant to move, even as suddenly as he did, on hearing the shout, but in doing so surely he must ensure that he is doing it safely. He must, before moving, make sure that it was safe for him to do so. It is my judgment that he owes a duty not only to the plaintiff but also to any other workers who may happen to be in the vicinity. In this case it is very apparent, even he himself in his evidence admitted that he reversed suddenly without knowing where plaintiff was and, according to him, forgot the safety of plaintiff. He must know plaintiff was in the vicinity of the forklift, he must also know the agility and fastness of the forklift having been a driver for some six years. Although he reversed suddenly in response to the shout he nevertheless, must ensure the safety of the plaintiff before doing so. His own evidence itself, let alone that of the plaintiff and Ong, showed his gross negligence. Even the Managing Director of the first defendant concedes in his evidence in cross-examination that before moving the forklift the driver must ensure that the attendant is safe. Both the first and second defendants in their evidence have in fact strengthened the evidence of the plaintiff. On the facts disclosed in the evidence before me, I hold that the second defendant to be wholly liable and the plaintiff has in no way contributed to the accident. The defence had adduced no evidence anywhere to show contributory negligence by the plaintiff.

On damages I find the plaintiff was 17 years old at the time of the accident. As a result of the accident his right foot was crushed and is now deformed and he now walks with a limp. Photograph on p. 2 of encl. (39) shows clearly the deformity to the foot. Before the accident he was a paid forklift attendant earning RM6 per day and sometimes more when he works overtime. He has now lost his job and could not get another job as an attendant or even as a labourer. Both parties have agreed that the item of special damages for medical report to be RM70. As for travelling expenses plaintiff claims RM300. I am of the view that his figure of RM300 is quite reasonable as plaintiff lives in Raub and had to come to Kuantan for treatment. For loss of total earnings learned Counsel for defence in his submission appears

to have agreed that it should be from the date of accident that is 22 October 1975 to 5 January 1977 that being the last date of treatment totalling 14 months. Plaintiff's earnings then was around RM200 per month. As such, I awarded a total amount of RM28,000 for loss of earnings. For pain and suffering, learned Counsel for defence quoted some cases where for almost similar injury in 1976 the Court awarded RM20,000. It is my view that RM20,000 in 1976 cannot be the same in 1983. As such, I am of the view that a sum of RM30,000 for pain and suffering would be a more realistic figure in this time and age. As for loss of earning capacity, no doubt plaintiff has to mitigate his loss. In this case plaintiff says that after the treatment he went back to see Mr. Quek the Managing Director but was told that there was no position for him. After that he tried to get other jobs but was not successful as he did not have the qualification. In view of his condition he could not get jobs which entail heavy work. I find that he had tried to mitigate his losses and as such, I awarded him a total sum of RM16,300. This figure I arrived at is for 81½ months from the date the plaintiff was last treated 5 January 1977 up to the date of judgment 15 November 1983, at RM200 per month.

As for future loss of earning capacity, I find that plaintiff is 25 years old and healthy but for the deformity he could continue working for a considerable number of years. For assessment of the loss of future earnings, the basis must be the reasonable duration of the working life which plaintiff would have but for the accident. As I said earlier, at the time of the accident plaintiff was 17 years old and now he is 25 and appears quite healthy. The possibility of the plaintiff continuing to work for another 30 years up to the normal retiring age of 55 years cannot be ruled out. In the circumstances, and after reduction for contingencies, it is my judgment that a multiplier of 25 would be a reasonable figure. For this item I therefore award the plaintiff at RM200 per month for 25 years totalling RM33,825.46 and rounding it off to RM33,900.

As for interest I refer to the Federal Court decision in *Murtadza b. Mohd. Hassan v. Chong Swee Pian* [1980] 1 MLJ 216 at 218 where the decision in the Court of appeal in England of *Jefford v. Gee* [1970] 1 All ER 1202 was followed. In the circumstances I award interest of 3% per annum on special damages from the date of accident to the date of service and thereafter at 6% per annum. I award no interest on the amount for future loss of earnings but on the rest of the award at interest of 6% per annum from the date of service of the writ to the date of judgment and thereafter at 8% per annum.

Also found at [1984] 1 CLJ 317